

TECHNICAL ASSISTANCE – EXTERNAL REVIEW PROCESS FOR PERFORMANCE PAY SYSTEM DISPUTES

Prepared by Division of Human Resources in the Department of Personnel and Administration – June 17, 2002.

BACKGROUND AND HIGHLIGHTS

This document is for use by human resources professionals and others who serve as reviewers in the external dispute resolution process.

By law, all matters related to the performance pay system are under the jurisdiction of the State Personnel Director who has delegated the final decision making to the Director of the Division of Human Resources (DHR). This authority includes the external review process and final decisions. Matters related to the performance pay system do not go to the State Personnel Board unless there is an allegation of discrimination or a corrective action associated with the performance plan or final overall evaluation. The Dispute Resolution Coordinator (DRC) in DHR administers the external review process.

Highlights of External Dispute Requirements

An employee who is directly affected by the application of a department's performance pay program may request an external review within five (5) working days of receipt of the internal dispute resolution decision. A department's internal dispute resolution process must be completed prior to initiating the written request for an external review.

An employee may request external review of the following two issues. These issues must have been raised in the original dispute during the internal review process. No new issues are allowed.

- Application of the department's performance pay program, policies, or processes to the employee's performance plan or final overall rating.
- Full payment of a performance award.

Either side involved in the dispute may have the assistance of an advisor. Retaliation for participating in the external dispute process is prohibited.

EXTERNAL DISPUTE RESOLUTION PROCESS

When a request for external review is received, the DRC confirms that the dispute is properly subject to the external review process and timely filed.

- A proper and timely request for external review is assigned a case number and proceeds through the external review process.

- If the dispute is not subject to the external review process or is untimely, the employee is notified in writing and the external review process ends.

The Director has the discretion to appoint a neutral third party to review the dispute and make a recommendation. If the Director decides to assign the dispute, the request for review will be assigned to an available qualified reviewer typically within one business day.

- Qualified reviewers are human resources professionals and others who have completed DHR's training in the performance pay system dispute resolution process. The DRC provides the training and maintains the list of available reviewers.

The DRC provides a packet of materials to the reviewer. The packet generally includes copies of the employee's written request for external review, the original issue(s) submitted at the time of the initial request, the department's final internal review decision, a copy of the section and page of the department's performance pay program at issue, and any other supporting documentation submitted with the request for external review. The reviewer may request additional information if deemed necessary.

The reviewer has 25 calendar days from the date DHR received the request for external review to prepare a written recommendation that includes rationale for the decision. The scope of the reviewer's authority is as follows:

- Limited to reviewing the facts surrounding the action within the limits of the department's performance pay program.
- Precluded from substituting his or her judgment for that of the rater, or the department's internal dispute resolution decision maker.
- Precluded from rendering a recommendation that would alter a department's performance pay program.
- Has the authority to instruct a rater to follow the department's performance pay program or to correct an error. This includes the authority to request the rater to reconsider an employee's performance plan or final overall rating if the department's program was not followed.
- Recommend mediation although it is not binding on the parties.

By the 25th day, the reviewer returns the recommendation to the DRC. The Director issues the final decision no later than 30 calendar days from the date DHR received the request for external review. No extensions of time are permitted. The decision is final and the external review process ends.

THE DECISION

A standard format is provided that includes the required elements of the decision (see attached).

The rationale for the decision must be based on information found in the record that relates to the issues. It should be clearly stated and be sufficient to support the conclusions of the review.

The decision must reach a conclusion on whether the department's internal decision was arbitrary, capricious, or contrary to rule or law. It must clearly state whether the department is being upheld or whether the matter is remanded, which is consistent with the conclusions.

- If a department did not follow its performance pay program policies or procedures to the extent that a different decision should have resulted based on the facts, the department's action will be remanded for appropriate action in accordance with the decision.

If the decision is to remand the matter to the department, the decision must clearly state the remedy or direction that needs to be taken.

- The fact that the employee may have interpreted the department's performance pay program policies or procedures differently does not necessarily mean that the department was arbitrary, capricious, or contrary to rule or law.

LEGAL GUIDELINES FOR REVIEWING A DEPARTMENT'S INTERNAL DECISION

The employee has the burden to prove that a department's internal decision was arbitrary, capricious, or contrary to rule or law. "Burden of proof" is the duty to establish the truth of the ultimate legal conclusion sought based on evidence. Some guidelines used to determine whether the employee has met the burden of proof are listed below. Additional guidance is provided in DHR's training of reviewers.

- Is the department's internal decision supported by competent evidence?
- Is there a clear error of judgment or gross abuse of discretion? Was important information or fact deliberately ignored or refused?
- Is there documentation of a clear error in calculation or payment of an award?
- The possibility of drawing two inconsistent conclusions from the evidence does not prevent the department's internal decision from being supported by substantial evidence.
- Is the error harmless in that it would not change the department's internal decision? Such harmless error should be mentioned in the rationale.

- A difference of interpretation or opinion does not necessarily mean the department was arbitrary, capricious, or contrary to rule or law.
- Is the department's action or decision reasonable? Could two reasonable people, independently considering the facts, reach the same conclusion?

Every attempt is made to keep this technical assistance updated. For more detailed information, refer to Chapter 8 of the Personnel Board Rules and Director's Administrative Procedures or contact your agency human resources office. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the laws and rules are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.

Performance Pay Dispute Resolution - External Review Decision

CASE NUMBER:

DATE SUBMITTED:

REVIEWER:

PETITIONER:

CLASS TITLE:

ADDRESS:

DEPARTMENT:

BASIS OF DISPUTE:

_____Application of Department's Program

_____Full Payment of Award

FINAL DECISION:

_____Department's Internal Decision Upheld

_____Department's Internal Decision Remanded*

***Remedy if Department's Action Remanded:**

_____Follow Program _____Correct Error

_____Reconsider Plan and/or Final Rating

Other suggestions:

DOCUMENTATION/INFORMATION REVIEWED:

FINAL DECISION BASED ON THE FOLLOWING RATIONALE:

DIRECTOR'S SIGNATURE: _____

DATE: _____

DATE ISSUED TO EMPLOYEE BY DPA/DHR: _____

THIS DECISION IS FINAL AND BINDING, AND NOT SUBJECT TO FURTHER APPEAL WITHIN THE STATE PERSONNEL SYSTEM.

6/17/02